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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ELIAS OMAR XICOTENCATL, Defendant and Appellant.	G056045 (Super. Ct. No. 13NF2420) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Patrick Donahue, Judge. Affirmed.

Jamie Popper, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Eric A. Swenson and Junichi P. Semitsu, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

Elias Omar Xicotencatl appeals from a sentence of life without the possibility of parole (LWOP) for forcible rape and sodomy of a minor (counts 1 & 2), and 17 years, 4 months for other sex crimes against three other minors. He raises numerous challenges to his convictions on counts 1 and 2, including insufficiency of evidence, trial court error, prosecutorial misconduct, and ineffective assistance of trial counsel. He also contends there was insufficient evidence of a minor victim's age to support his conviction for assaulting a minor with intent to commit a sexual offense. Finally, he contends he was denied equal protection because he is not entitled to a youthful offender parole hearing (Pen. Code, § 3051; all further statutory citations are to the Penal Code unless otherwise stated). For the reasons stated below, we find no reversible error or equal protection violation, and therefore affirm the judgment.

I

FACTUAL AND PROCEDURAL BACKGROUND

Xicotencatl was charged with crimes against four minors who attended two schools in Anaheim.

A. *Prosecution Case*

1. Counts 1 & 2 (victim Vanessa H.)

On March 31, 2011, at approximately 8:00 a.m., 14-year-old Vanessa H. was walking by herself to her Anaheim high school when she noticed a "white Hispanic male" standing on the sidewalk, near a parked white van with bars on the windows. The van's sliding door was ajar, and the man seemed to be searching for something inside the vehicle. When Vanessa walked past, the man grabbed her from behind and placed a knife at her throat. He told Vanessa to get in the van, and she complied because she "was scared for my life."

The male assailant made Vanessa lie down on the floor of the van. He used a rope to tie her hands and feet, blindfolded her and covered her head with a pillowcase. Vanessa did not look at the assailant. The assailant then drove approximately 20 minutes

before stopping. He entered the back of the van, and Vanessa heard him unbutton his pants and pull down his zipper. After removing Vanessa's pants and underwear, the man repeatedly inserted his penis into her anus and vagina. The assailant then untied Vanessa, removed her blindfold, and let her go. After exiting, Vanessa recognized her location and proceeded to walk to her high school. The assailant drove off.

Pamela K., the principal of Vanessa's high school, testified that shortly after the start of school that morning, she was informed there was an incident concerning Vanessa. When Pamela questioned Vanessa, Vanessa stated "a man took her" and "stuck his thing up my butt." Vanessa took a pillowcase out of her backpack and informed Pamela the assailant had placed the pillowcase over her head. She also showed Pamela the rag the assailant used to cover her eyes. Pamela contacted the Anaheim Police Department and reported the incident. She also testified that Vanessa was a special education student who had difficulty comprehending classroom subject matters and expressing herself.

Anaheim Police Officer Armando Pardo interviewed Vanessa, who described her assailant as a thin, 6' 5" tall, light-skinned Hispanic man with a long dark beard. Vanessa, however, "wasn't exactly sure of herself" while describing the assailant. Vanessa recounted how the assailant placed a knife to her throat, forced her into a van, tied her up, blindfolded her with a rag, placed a pillowcase over her head, and drove her around for approximately 45 minutes. The assailant asked if Vanessa was a virgin and told her, "You are going to like it." He then removed the blindfold and proceeded to sodomize and vaginally rape her. He blindfolded her again and then drove for about five minutes before ordering her out of the van. When Vanessa exited, she took off the blindfold, which she retained and later gave to Pardo. Pardo testified that Vanessa, unlike other similar victims, was fairly calm and did not display much emotion when talking to him.

At trial, Vanessa testified that Xicotencatl was not her attacker. She remembered her assailant being a "little bit past 6 feet tall" and in his late 30's or 40's, in contrast to Xicotencatl, who was 5' 7" inches tall and 19 years old at the time of the crime. Vanessa acknowledged she never saw her assailant's face, and that she was focused on trying to get away rather than getting "a really good description of him." She also never saw her assailant standing and she based her estimate of his height when she saw him looking into his van.

Jorge B., whose son attended the same high school, testified that after dropping his son off that morning, he saw a man grab a female student, push her into a van and drive off. Jorge, who was about "five or six houses" away, described the man as thin, about 5' 4" to 5' 6" tall, and wearing a navy blue hooded sweatshirt and pants.

Patricia Harris, a forensic sexual assault nurse, testified she performed an examination of Vanessa the day of the sexual assault. Harris concluded Vanessa's injuries were consistent with her account of the assault. Harris also collected numerous body swabs from Vanessa for examination.

Richard Gustilo, a forensic scientist with the Orange County Crime Lab, testified the swabs collected from Vanessa were subject to various tests, including DNA testing. A preliminary screening test for the presence of semen showed only the labia sample had any semen. Gustilo examined a portion of the labia swab under a microscope and observed a single sperm spell. All samples, including the labia sample, tested negative for P30, a component of semen. Gustilo, however, testified the absence of P30 could be explained if the semen was very diluted. After extracting the small amount of sperm from the entire labia sample, Gustilo obtained a DNA profile. He then entered the DNA profile into the national Combined DNA Index System (CODIS) database. In 2013, Gustilo was notified Xicotencatl was a possible match, and a later test confirmed the match. Gustilo testified the chance that Xicotencatl's DNA profile would match the sperm DNA taken from Vanessa's labia was one in a trillion. Gustilo also testified that

based on the amount of sperm DNA extracted, there was "about 36 total sperm, individual sperm in th[e] sample itself." On cross-examination, Gustilo acknowledged the sperm found in the labia sample could have been deposited days earlier and transferred to the victim from some other source. He also opined the amount of sperm DNA extracted from the labia sample indicated "perhaps maybe 30 to 36 sperm cells" were obtained from the sample.

Gustilo also tested the blindfold rag. While a major male DNA profile obtained from swabs of the rag excluded Xicotencatl as the contributor, the DNA profile shared enough similarities to his DNA that the source was likely a blood relative, such as his father or son. There was DNA from at least three other individuals on the rag, but not enough of a sample to generate separate DNA profiles. Gustilo also testified that an internal rectal sample was subject to Y haplotype testing, and the test indicated Xicotencatl could not be excluded as a contributor. Gustilo, however, acknowledged that Y haplotype testing was not very precise: one in eight males would match the Y haplotype profile Gustilo obtained.

2. Count 3 (victim Katherine C.)

On November 9, 2012, at approximately 7:20 a.m., 11-year-old Katherine C. left her home and walked by herself to her junior high school in Anaheim. Along her route, she observed a man standing near a black, four-door car that was parked on the curb with its passenger door open. As Katherine approached, the man said he needed her help, explaining he had dropped his keys under his car seat, but his hands were too big to reach under the seat. Katherine "had a bad feeling" and kept walking.

The man then began following Katherine in his car, "going in circles" and passing by her numerous times. As Katherine approached one of her school's gated entrances, the man exited his vehicle and again asked her to help him. Katherine ran away and encountered a classmate. The man then drove away.

Katherine informed a school administrator about the man, and later spoke with a police officer. The police later showed Katherine a six-pack photo array. She identified Xicotencatl's photograph and another person's photograph as resembling the suspect.

3. Count 4 (victim Alexis M.)

On November 9, 2012, at approximately 8:15 a.m., 12-year-old Alexis was walking by herself to the same junior high school as Katherine, the victim in count 3. Alexis noticed a man standing next to a black car. He walked toward Alexis and asked her to help retrieve his keys, claiming the keys had fallen between his car's seats and "his hands were too big and he needed smaller hands." Alexis told the man she could not help him because she already was late for school and would be expelled if she arrived any later. The man responded he would drive her to her school. When Alexis tried to walk away, the man placed his hands on her shoulders. Alexis asked the man if he had any tools she could use to get the car keys and he pointed to his car.

When another car passed by, Alexis said "Help," but the vehicle did not stop. Fearing she was going to end up in the suspect's car, Alexis ran away. Alexis threw her water bottle at the suspect when he chased after her. She is ran toward a house and as she got close, she looked behind and saw the suspect running back toward his car.

Alexis called 911 on her cellphone. In the 911 call, which was played for the jury, Alexis described the suspect as a "Hispanic" man in his 30's, wearing a dirty, white, long-sleeved shirt. On July 15, 2013, the Anaheim Police Department showed Alexis a six-pack, and Alexis selected Xicotencatl's photograph as resembling her assailant.

4. Counts 5 and 6 (victim Isabel P.)

Isabel testified she attended the same Anaheim high school as Vanessa, the victim in counts 1 and 2. While in high school, Isabel was on the cross-country running team. On Saturday, July 13, 2013, at around 7:30 a.m., Isabel walked to her high school

to attend a team practice. As she approached the school's entrance gate, she noticed a man – later identified as Xicotencatl – standing by a green four-door car parked on the curb. Xicotencatl approached and asked her for directions to get into the school, which she considered "a little weird because if you know the area, you know how to get there." Isabel told him he should go around to a different entrance because the gated entrance was locked on weekends. Xicotencatl then asked her in a "very predatory" manner if she would help him retrieve his cell phone. He explained "he had dropped his phone in between the seats and couldn't reach because his hands were too big, and then he told me that my hands looked small." Feeling very unsafe and uncomfortable, Isabel replied, "No, sorry," and started walking away.

Isabel walked toward the locked school gate and threw her bag over it. As she prepared to jump the gate, she heard Xicotencatl running up behind her. When she turned around, she saw he was wielding a foot-long black metal rod with a sharp, pointed tip. Xicotencatl lunged toward Isabel and jabbed at her with the rod. Isabel ducked and began screaming for help.

Raven D., a nearby resident, saw the entire incident from her bedroom. When Raven saw Xicotencatl chasing Isabel with the metal rod, she ran outside and yelled at Xicotencatl to leave Isabel alone. When Xicotencatl saw Raven, he ran back to his car and drove away. Isabel looked at the car's license plate and began screaming out the number until Raven wrote it down. Raven then called the Anaheim Police Department and reported the incident.

Later that same day, the Anaheim Police Department used the license plate number to track down Xicotencatl. When the police detained Xicotencatl's vehicle, they discovered a black metal rod with a pointed tip in the trunk, as well as rope, tape and clothing.

Isabel went to the police station, where she identified Xicotencatl as her assailant. Raven also identified him in a live lineup. At trial, both Isabel and Raven identified Xicotencatl as the perpetrator.

B. *Defense Case*

Suzanna Ryan, a forensic DNA consultant, testified she reviewed Gustilo's testing and analysis. Ryan testified the absence of P30 and the very low amount of sperm cells was consistent with "indirect transfer" of semen from something else. Ryan explained that sperm cells can transfer "in the wash" or "from a person sitting on an item, a bed sheet, something like that, that has a semen stain on it." She testified that subsequent transfers could occur, but there would be less and less material with each transfer. On cross-examination, Ryan acknowledged that in a study on transfer between clothes in the wash, only a small amount of sperm – 18 sperm cells – was transferred.

C. *Jury Verdicts and Sentence*

Xicotencatl was charged with the forcible rape of a minor, Vanessa (§ 261, subd. (a)(2); count 1); forcible sodomy of a minor, Vanessa (§ 286, subd. (c)(2); count 2); attempted kidnapping to commit a sex offense against Katherine, Alexis, and Isabel (§§ 209, subd. (b)(1), 664, subd. (a); counts 3-5); and assault of a minor, Isabel, with intent to commit a sex offense (§ 220, subd. (a)(2); count 6). On counts 1 and 2, the information further alleged that in committing those offenses, Xicotencatl kidnapped Vanessa, increased the risk of harm, violated sections 207, 209, and 209.5, personally used a dangerous and deadly weapon in violation of section 12022, subdivision (b)(1), and engaged in tying and binding of the victim (§ 667.61, subds. (a), (b), (d)(2), (e)(1), (e)(3), & (e)(5)).

A jury found Xicotencatl guilty of all charges and found all allegations true. The court sentenced Xicotencatl to two concurrent LWOP terms on counts 1 and 2. On the remaining counts, the court sentenced Xicotencatl to a total determinate sentence of 17 years and 4 months.

II

DISCUSSION

A. *Substantial Evidence Supports the Convictions on Counts 1 and 2*

Xicotencatl challenges the sufficiency of the evidence to support his convictions for forcible rape and sodomy of Vanessa. Xicotencatl does not dispute that Vanessa was sexually assaulted and her assailant deposited Xicotencatl's DNA on Vanessa. He argues, however, that his DNA could have been indirectly transferred to Vanessa, and notes that Vanessa testified he was not the assailant. We conclude the presence of Xicotencatl's DNA constitutes substantial evidence to support the convictions.

In resolving insufficiency claims, "we review the whole record to determine whether any rational trier of fact could have found the essential elements of the crime or special circumstances beyond a reasonable doubt. [Citation.] The record must disclose substantial evidence to support the verdict—i.e., evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.]" (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.) "Proof of identity is a matter for the jury's determination and where there is substantial testimony in support of the identity . . . , the judgment will not be reversed because of the failure of the memory of one or more witnesses to the event under consideration." (*People v. Newman* (1951) 102 Cal.App.2d 302, 305.) "Even where, as here, the evidence of guilt is largely circumstantial, our task is not to resolve credibility issues or evidentiary conflicts, nor is it to inquire whether the evidence might reasonably be reconciled with the defendant's innocence. [Citation.] It is the duty of the jury to acquit the defendant if it finds the circumstantial evidence is susceptible to two [reasonable] interpretations, one of which

suggests guilt and the other innocence. [Citation.] But the relevant inquiry on appeal is whether, in light of all the evidence, '*any* reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt.' [Citation.]" (*People v. Zaragoza* (2016) 1 Cal.5th 21, 44.)

Here, the jury reasonably could infer that Xicotencatl committed forcible rape and "forcible sodomy from the presence of sperm, [and] the DNA evidence linking him to the victim." (*People v. Jones* (2013) 57 Cal.4th 899, 963.) Xicotencatl's sperm was found on the victim's labia, and the DNA from an internal rectal sample did not exclude Xicotencatl as the contributor, i.e., he was among a large group of males (1 in 8) who shared the Y haplotype profile. The jury reasonably could reject the defense theory Xicotencatl's sperm may have been deposited via indirect transfer as speculative. Xicotencatl presented no evidence on how a third party would have access to Xicotencatl's sperm and had the opportunity, motive, and means to commit the offenses. No testimony was presented about Xicotencatl's family or his life circumstances. More important, "[t]he existence of possible exculpatory explanations, whether they are simply suggestions not excluded by the evidence or even where they could be reasonably deduced from the evidence, could not justify this court's rejecting the determination of the trier of fact that defendant is guilty unless on appeal it 'be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below.' [Citation.]" (*People v. Redrick* (1961) 55 Cal.2d 282, 290.) Because it is reasonably probable that Xicotencatl's DNA was left on the victim because he assaulted her, the defense theory of indirect transfer cannot support reversal of the jury's guilty verdict.

Nor does the victim's testimony that Xicotencatl was not the assailant furnish a basis to overturn the jury's conclusion that Xicotencatl was the perpetrator. The jury heard evidence the victim only had a brief glimpse of the assailant before she was assaulted and blindfolded. More important, "fear and nervousness often cause faulty

memory or confusion." (*People v. Jackson* (1960) 183 Cal.App.2d 562, 568.) In contrast, Jorge, a percipient witness, saw the assailant and gave a general description of the assailant's height and build that matched Xicotencatl's. The jury was entitled to credit Jorge's testimony over the victim's. (See *People v. Hill* (1998) 17 Cal.4th 800, 849 [inconsistencies in identification of defendant, who was 5 feet 10 inches tall, where one eyewitness told police perpetrator was 5 feet 4 inches to 5 feet 5 inches tall, and another eyewitness testified that defendant was definitely not the perpetrator, were "merely discrepancies in the evidence the jury considered and resolved against defendant"].) Thus, we conclude substantial evidence supported Xicotencatl's convictions on counts 1 and 2.

B. *The Trial Court Did Not Prejudicially Err in Permitting the Prosecution to Tell the Jury Counts 3 through 5 Could Be Used to Prove the Suspect's Identity in Counts 1 and 2*

Xicotencatl argues the trial court prejudicially erred in permitting the prosecutor to argue to the jury that it could use the evidence on counts 3 through 5 to find Xicotencatl was the perpetrator in counts 1 and 2. We conclude any error was harmless.

1. Relevant Facts

When the parties were discussing jury instructions, the trial court stated it had doubts whether the evidence in counts 3 through 5 was cross-admissible under Evidence Code section 1108 because it was unsure whether the offenses were sex offenses, but noted the prosecution was not asking for an instruction on Evidence Code section 1108.[1] The court, however, stated its belief the evidence on counts 3 through 5

[1] Evidence Code section 1108, subdivision (a), provides: "In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352."

Evidence Code section 1101 generally precludes the use of character evidence to prove propensity to commit an offense, unless the character evidence is relevant to some other fact, such as identity.

was cross-admissible to show the identity of the perpetrator in counts 1 through 2, and the evidence on counts 1 and 2 was cross-admissible to show the intent of the perpetrator in the other counts. It noted that both the prosecutor and defense counsel "said that you agreed with that." Defense counsel did not state any disagreement or objection.[2]

The prosecutor in closing arguments argued that evidence on each count was cross-admissible with each other. Although the prosecutor mainly relied on the DNA evidence and Jorge's identification to show Xicotencatl was the perpetrator on counts 1 and 2, the prosecutor argued several times the evidence on the other counts supported the identification. Defense counsel never objected, and the trial court did not give an instruction on cross-admissibility of evidence.

2. Analysis

Xicotencatl contends the trial court erred in permitting the prosecution to argue the evidence in counts 3 to 5 was cross-admissible on the issue of the perpetrator's identity in counts 1 and 2. Xicotencatl failed to object below and therefore forfeited the issue on appeal. (See Evid. Code, § 353; *People v. Alexander* (2010) 49 Cal.4th 846, 912 [failure to object to improper character evidence forfeits the claim on appeal].)

Even if not forfeited, any error was harmless. (See *People v. Harris* (2013) 57 Cal.4th 804, 842 [trial court's ruling permitting jury to consider uncharged burglary as

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Evidence Code section 352 provides that a "court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

[2] Both parties argue that although the trial court only referenced counts 3 to 5, it presumably meant counts 3 to 6, given that counts 5 and 6 are based on the same wrongful act. The offenses charged in counts 3 through 5, violations of section 209, are not among the crimes listed as sex offenses in Evidence Code section 1108. (See Evid. Code, § 1108, subd. (d).) However, the offense charged in count 6, violation of section 220 with intent to commit a sex offense, is a sex offense. (See *id.*, § 1108, subd. (d)(1)(B).)

"evidence of the identity of the person who burglarized [current victim's] apartment" reviewed for prejudice under *People v. Watson* (1956) 46 Cal.2d 818, 836].) The evidence Xicotencatl committed counts 1 and 2 was strong, if not overwhelming. Xicotencatl's sperm was found on the victim's labia, and Y haplotype testing did not exclude him as a contributor to bodily material left in the victim's rectum. A percipient witness gave a description of the assailant's build and height that matched Xicotencatl's, and the rag used to blindfold the victim contained DNA from an individual who was closely related to Xicotencatl, suggesting the assailant had access to the related individual's clothing or DNA. It is not reasonably probable that Xicotencatl would have obtained a more favorable result had the jury been instructed not to consider the evidence in counts 3 through 5 in deciding guilt on counts 1 and 2.[3]

C. *The Prosecution Did Not Commit Misconduct in Arguing Indirect Transfer Was Not Possible*

Next, Xicotencatl argues the prosecutor committed misconduct during rebuttal argument when he purportedly misstated the evidence about the amount of sperm cells in the labia sample and claimed indirect transfer was "basically scientifically impossible" because the one study on sperm cell transfer in the wash showed only 18 sperm cells were transferred. We find no misconduct.

1. Relevant Facts

In closing arguments, the prosecutor argued:

> "What does the literature say how many sperm cells get transferred? One? Two? Maybe three. And that's not into somebody's genitals. It's onto underwear or a piece of clothing, whatever clothing is being washed. All right?

[3] Because count 6 qualified as a sex offense, the evidence on that count was cross-admissible under Evidence Code section 1108 if it did not violate Evidence Code section 352.

"Now, the most the literature said [was] ever found transferred is what? Eighteen. Now, we know we have 30 to 36 sperm cells here, probably a few more. When they swabbed the labia, it didn't all come up. So right there the scientific literature is telling you this isn't even happening.

"Second, what does the science say about transfer – multiple transfers? Every single time it's done, it's less and less and less. So if the wash is even done and there's a transfer of, say, three sperm cells, guess what? When that individual puts on that underwear, you're probably going to get even fewer transferred to his body. Maybe one. Maybe two. Okay? Then this supposed rape mentor, this supposed real rapist, goes out, grabs Vanessa, rapes her, so even fewer sperm cells are gonna transfer. So now you're down to maybe, what, one? Two? And we know there's 30 to 36 at least."

The trial court overruled defense counsel's objection the prosecutor misstated the evidence. The prosecutor then continued discussing indirect transfer and concluded that it was "basically scientifically impossible here."

2. Discussion

"'"To prevail on a claim of prosecutorial misconduct based on remarks to the jury,"'" there must appear "'"a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner." [Citation.] "Prosecutors have wide latitude to discuss and draw inferences from the evidence at trial. [Citation.] Whether the inferences the prosecutor draws are reasonable is for the jury to decide."' [Citation.]" (*People v. Jablonski* (2006) 37 Cal.4th 774, 835.) A prosecutor commits misconduct if he or she misstates the evidence. (*People v. Davis* (2005) 36 Cal.4th 510, 550.)

Xicotencatl argues the prosecutor's comment that there were "at least" 30 to 36 sperm cells found in the labia sample misstated the evidence because Gustilo only testified that based on the amount of sperm DNA extracted, "perhaps maybe 30 to 36 sperm cells" were in the labia sample. The prosecutor's comment was a fair and reasonable inference from Gustilo's testimony because Gustilo did not preclude the possibility there was at least, if not more than, 30 to 36 sperm cells in the labia sample.

Xicotencatl also argues the prosecutor misstated the evidence or relied on facts not in evidence when he stated "the most the [scientific] literature said [was] ever found transferred" was 18 sperm cells. Again, the prosecutor's statement was a fair comment on the evidence. Ryan testified that in a study on transfer of sperm cells in the wash, "the most that were found were about 18 cells." Neither Ryan nor Gustilo testified about any other study on sperm cell transfer. Xicotencatl argues the jury could have believed that prosecutor's comment suggested knowledge of other scientific studies on sperm cell transfers. When viewed in context, we find no reasonable likelihood the jury would have misunderstood the comment. There was no prosecutorial misconduct during closing arguments.

D. *Xicontecatl Has Not Shown Ineffective Assistance of Trial Counsel*

Xicotencatl argues he received ineffective assistance of counsel because his trial counsel (1) diluted the prosecution's burden of proof by using the term "tiebreaker" when describing the evidence; (2) informed the jury he did not retest the swabs for DNA because "the evidence against [my client] is bad enough"; and (3) failed to object to the prosecutor's comments on sperm cell transfer during closing arguments.

"In order to demonstrate ineffective assistance, a defendant must first show counsel's performance was deficient because the representation fell below an objective standard of reasonableness under prevailing professional norms. [Citation.] Second, he must show prejudice flowing from counsel's performance or lack thereof. Prejudice is shown when there is a reasonable probability that, but for counsel's unprofessional errors,

the result of the proceeding would have been different." (*People v. Williams* (1997) 16 Cal.4th 153, 214-215.) "'If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.'" (*In re Cox* (2003) 30 Cal.4th 974, 1019-1020].)

1. "Tiebreaker"

During closing arguments, defense counsel argued the case was "a classic case of reasonable doubt." According to counsel, the evidence showed either that Xicotencatl was the perpetrator in counts 1 and 2, or that another person – "an older, taller" "successful predator" – was the perpetrator. Counsel proceeded to reference exculpatory evidence and argued that evidence was a "tiebreaker" to find Xicotencatl was not the perpetrator. He argued three times that the pattern or modus operandi (M.O.) of the assault against Vanessa was "very, very different" from the M.O. of three other assaults, and the difference in M.O.'s was a "tiebreaker." He also argued that Vanessa's identification "alone should give you reasonable doubt, but the tiebreaker is the M.O." Finally, he argued that because the assault on Vanessa predated the other assaults, the jury would have to believe that a "decisive, violent, no fooling around, successful predator" had "regresse[d] into this sort of tentative, bumbling, learning predator." The improbability of this occurrence was a "tiebreaker."

Xicotencatl argues the use of the term "tiebreaker" diluted the prosecution's burden to prove guilt beyond a reasonable doubt because it suggested the prosecution need only prove guilt by a preponderance of the evidence since a "tie" is 50-50. We address this claim in light of the fact that "[t]he decision of how to argue to the jury after the presentation of evidence is inherently tactical," (*People v. Freeman* (1994) 8 Cal.4th 450, 498), and thus, "[r]eversals for ineffective assistance of counsel during closing argument rarely occur" (*People v. Moore* (1988) 201 Cal.App.3d 51, 57). We will not reverse a conviction for ineffective assistance on direct appeal unless "(1) the record affirmatively discloses counsel had no rational tactical purpose for the challenged act or

omission, (2) counsel was asked for a reason and failed to provide one, or (3) there simply could be no satisfactory explanation." (*People v. Mai* (2013) 57 Cal.4th 986, 1009.)

Here, the record discloses a "rational tactical purpose" and "satisfactory explanation" for counsel's argument. When viewed in context, defense counsel argued the evidence needed to prove guilt beyond a reasonable doubt was close or "tied," and the different M.O.'s broke that tie in favor of the defense. Counsel argued the case was a "classic case of reasonable doubt," and in prefacing his argument the M.O. was a tiebreaker, he argued that Vanessa's testimony Xicotencatl was not the perpetrator "alone should give you reasonable doubt." Moreover, counsel's comment did not make conviction more likely in a close case. Rather, the evidence weighed heavily in favor of Xicotencatl's guilt. His DNA was found on the victim, and the only reasonable explanation for the presence of his DNA was that he was the perpetrator. In arguing the evidence was close or tied, defense counsel was suggesting the jury needed more evidence to prove guilt. Xicotencatl has not shown counsel's comments in closing arguments diluted the prosecution's burden of proof beyond a reasonable doubt.[4]

2. DNA Retesting

During closing arguments, defense counsel explained why he did not retest the swabs taken from Vanessa for DNA. He stated, "Look, the burden of proof is not on me. The burden of proof is on the prosecution. All right? And let's be frank. I mean the evidence against him is bad enough. Do I want to make it worse by – I mean, they should have done more testing on those swabs because what they got on that familial hit should have been enough to say, 'you know what, we may have another assailant here who's related to Xicotencatl.' All right? They are the ones that should have done additional testing."

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[4] We note the jury was instructed properly on the prosecution's burden of proof.

Xicotencatl zeroes in on certain comments (". . . let's be frank. I mean, the evidence against him is bad enough. Do I want to make it worse . . . ?") and argues a reasonable jury would have understood those comments to mean that defense counsel believed Xicotencatl was guilty of counts 1 and 2. However, where the record on direct appeal "does not show the reason for counsel's challenged actions or omissions, the conviction must be affirmed unless there could be no satisfactory explanation." (*People v. Anderson* (2001) 25 Cal.4th 543, 569.) Consequently, a claim of ineffective assistance is generally rejected on direct appeal and more properly raised in a petition for habeas corpus, which can include declarations and other information outside the appellate record that reveal the reasons for the challenged conduct. (*People v. Mayfield* (1993) 5 Cal.4th 142, 188 ["tactical choices presented . . . on a silent record" are "better evaluated by way of a petition for writ of habeas corpus" and will be rejected on direct appeal].) For example, although poorly phrased, when viewed in context, counsel's comments could be interpreted as arguing that even if the DNA testing showed Xicotencatl's DNA had been deposited on the victim, the minimal amount of DNA was inconsistent with his guilt and more consistent with an indirect transfer by a relative. (Cf. *People v. Mitcham* (1992) 1 Cal.4th 1027, 1060-1061 ["good trial tactics often demand complete candor with the jury, and . . . in light of the weight of the evidence incriminating a defendant, an attorney may be more realistic and effective by avoiding sweeping declarations of his or her client's innocence."].)

In any event, Xicotencatl has failed to show he was prejudiced. (See *In re Cox*, *supra*, 30 Cal.4th at pp. 1019-1020 [ineffectiveness claim may be resolved based on lack of showing of prejudice].) As noted, the strong, if not overwhelming, evidence showed Xicotencatl was the perpetrator on counts 1 and 2. His DNA was found on the victim and the DNA found in the victim's rectum matched his Y haplotype profile. The rag used to blindfold the victim contained DNA from a close relative, and a percipient witness provided a general description that matched him. In light of the evidence

presented to the jury, "we cannot find that there is a reasonable probability—i.e., a probability sufficient to undermine confidence in the outcome" – that the results would have been different but for counsel's comments. *(In re Fields* (1990) 51 Cal.3d 1063, 1080-1081.) Accordingly, we reject Xicontencatl's ineffective assistance claim on appeal.

3. Failure to Object to Prosecutor's Comments

Finally, Xicotencatl alleges trial counsel was ineffective for failing to object to prosecutorial misconduct in closing arguments. He contends the prosecutor committed misconduct by misstating the facts (*People v. Davis*, *supra*, 36 Cal.4th at p. 550) and drawing adverse inferences from the fact Xicontencatl did not testify (*Griffin v. California* (1965) 380 U.S. 609, 615 (*Griffin*)). We address this claim, keeping in mind that "[a]n attorney may choose not to object for many reasons, and the failure to object rarely establishes ineffectiveness of counsel." (*People v. Kelly* (1992) 1 Cal.4th 495, 540.)

During rebuttal argument, the prosecutor stated:

> "Now, when [defense counsel] talks about, well, let's talk about the washing machine and the transfer of all this, okay, well, first of all, number 1, do we have any–and I mean any–testimony, any evidence whatsoever from defendant's family member? From his friends? Did anyone come up here and start talking to you about how they live with the defendant or how they know the defendant lives with his brother or if he even has a brother or his father is even still alive? Or if they do, do they do their wash together? Did you get any evidence of that from right here? Because I didn't hear any. And so guess what? All of that is complete and utter speculation that you cannot consider. You need to consider evidence.
>
> "Okay. There is zero evidence, zero whatsoever, of any washing machine transfer, or the fact that he ejaculated in something and

did the wash with family members. Plenty of 19, 20, 21 year-olds don't even live with family members. They live with friends, live on their own. And there's zero evidence of it. Why not call a witness if this is your big theory to say, hey, this is what could happen? Logical witness. Not there. That's telling."

After arguments, the jury was instructed with CALCRIM No. 355, which provides: "Do not consider for any reason at all the fact that the defendant did not testify. Do not discuss that fact during your deliberations or let it influence your decision in any way."

Xicotencatl argues his lawyer rendered ineffective representation when he failed to object to the prosecutor's argument that the jury could not consider the indirect transfer theory. We do not view the prosecutor's comments as stating the jury could not consider the indirect transfer theory, but as arguing that a jury should not consider a theory unsupported by any evidence. A prosecutor may urge a jury to reject an implausible theory lacking evidentiary support. (See *People v. Centeno* (2014) 60 Cal.4th 659, 672 ["It is permissible to argue that the jury may reject impossible or unreasonable interpretations of the evidence and to so characterize a defense theory."]; *People v. Cleveland* (2004) 32 Cal.4th 704, 764 ["Although a jury may not be prevented from considering mitigating evidence, the prosecutor may argue that the evidence does not, in fact, support a particular mitigating factor."].)

Nor did the prosecutor's comments violate *Griffin*. There, "the United States Supreme Court held that the prosecution may not comment upon a defendant's failure to testify in his or her own behalf. Its holding does not, however, extend to bar prosecution comments based upon the state of the evidence or upon the failure of the defense to introduce material evidence or to call anticipated witnesses. [Citations.] Nonetheless . . . a prosecutor may commit *Griffin* error if he or she argues to the jury that certain testimony or evidence is uncontradicted, if such contradiction or denial could be

provided *only* by the defendant, who therefore would be required to take the witness stand." (*People v. Bradford* (1997) 15 Cal.4th 1229, 1339.) "We evaluate claims of *Griffin* error by inquiring whether there is 'a reasonable likelihood that any of the [prosecutor's] comments could have been understood, within its context, to refer to defendant's failure to testify.'" (*People v. Sanchez* (2014) 228 Cal.App.4th 1517, 1523.)

Here, the prosecutor's argument was a fair comment on the state of the evidence, which falls outside the purview of *Griffin*. The prosecutor observed that Xitocencatl did not present any evidence, such as testimony from his family members or friends, to support an indirect transfer theory. "These remarks contained no references, express or implied, to defendant's silence at trial, and therefore were not improper." (*People v. Valdez* (2004) 32 Cal.4th 73, 127; see also *People v. Thomas* (2012) 54 Cal.4th 908, 945 [finding no *Griffin* error where in commenting on defense alibi theory, "the prosecutor's comments were framed in terms of the failure to call some person *other than defendant* who would testify that defendant 'was with me'"].) Given that the prosecutor's comments were not improper, "there was no reason for a defense objection. Therefore, the failure to object did not result in a violation of defendant's constitutional right to the effective assistance of counsel." (*People v. Lopez* (2008) 42 Cal.4th 960, 968.)[5]

E. *No Cumulative Error*

Xicotencatl contends the cumulative prejudice from the preceding claims of error requires reversal. Xicotencatl has not shown error or "'we have found each error or possible error to be harmless when considered separately. Considering them together we likewise conclude that their cumulative effect does not warrant reversal of the judgment.'" (*People v. Panah* (2005) 35 Cal.4th 395, 479-480.)

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[5] Xicotencatl did not separately argue the prosecutor committed prejudicial misconduct when commenting on the sperm cell transfer theory. If not forfeited, we would conclude the comments were not improper and did not constitute *Griffin* error.

F. *Substantial Evidence Showed Isabel Was a Minor*

Before the jury was selected, the trial judge read the charging document to the prospective jurors. As to count 6, the charging document alleged that "on or about July 13th of 2013, in violation of section 220(a)(2) of the Penal Code, assault of a minor with intent to commit a sexual offense, the defendant is alleged to have unlawfully assaulted Isabel P., a minor under the age of 18 with the intent to commit rape or sodomy or oral copulation." Although the prosecutor repeatedly referred to Isabel as a 16-year old girl during closing arguments, the prosecutor did not ask Isabel about her birth date or age. Isabel testified she was attending high school in July 2013, and on July 13, 2013 – the day Xicotencatl assaulted her – she was heading to her high school's cross-country team's summertime practice. The jury saw a photograph of Isabel the police had taken on July 13, 2013, and it also saw her give live testimony on September 20, 2107. The verdict form for Count 6 stated that the crime was assault of "A MINOR" and that Isabel was a 16-year-old minor. The jury convicted Xicotencatl on count 6. On appeal, he contends there was insufficient evidence to show the victim Isabel was 18 years old or younger.[6]

Xicotencatl argues the prosecutor failed to present substantial evidence that Isabel was a minor. We disagree. The jury saw Isabel's appearance at the time of the assault and four years later at trial. "'[T]he *outward physical* appearance of an alleged minor may be considered in judging of his [or her] *age*.' [Citation.]" (*People v. Montalvo* (1971) 4 Cal.3d 328, 335; cf. *In re James D.* (1987) 43 Cal.3d 903, 917 ["Youthful appearance, we conclude, is a highly relevant and objectively verifiable *factor*

[6] In a footnote in Xicotencatl's opening brief, he notes the jury never was instructed that age was an essential element of the offense. However, he does not develop this argument further. We decline to consider any instructional error. (See *Sabi v. Sterling* (2010) 183 Cal.App.4th 916, 947 ["Footnotes are not the appropriate vehicle for stating contentions on appeal. [Citation.]"].)

in determining the propriety of a truancy detention" of a minor].) Isabel's appearance was corroborated by her trial testimony she was assaulted when heading to a summertime high school team practice. The vast majority of high school students are minors. (See *Seibert v. City of San Jose* (2016) 247 Cal.App.4th 1027, 1052 [while "not all high school students are minors," "[m]ost students reach the age of majority sometime in their senior year."].) From Isabel's testimony, the jury reasonably could infer Isabel was assaulted when she still had at least one year of high school left because she would be participating on her high school's team the following school year. (See *Zuehlsdorf v. Simi Valley Unified School Dist.* (2007) 148 Cal.App.4th 249, 252 ["Participation in high school sports is governed by the California Interscholastic Federation (CIF)"]; *Jones v. California Interscholastic Federation* (1988) 197 Cal.App.3d 751, 756 [challenge to CIF's eligibility rules for high school sports not moot although student athlete will have completed his senior year before appeal concluded].) Finally, no evidence was presented suggesting Isabel was not a minor. On this record, we conclude substantial evidence supported the jury's determination that Xicotencatl committed the offense of assault on a minor with intent to commit a sexual offense in violation of section 220, subdivision (a)(2).

G. *Xicotencatl Was Not Entitled to a Youthful Offender Parole Hearing*

Under section 3051, a person convicted of an offense committed when he or she was 25 years of age or younger becomes eligible for release on parole at a youthful offender parole hearing held during his or her 15th, 20th, or 25th year of incarceration, depending on the offense. (§ 3051, subd. (b).) Subdivision (h) of section 3051, however, "expressly excludes from eligibility for a youthful-offender parole hearing any inmate sentenced under the 'Three Strikes' law, under the One Strike law, or to life without possibility of parole (LWOP) for an offense committed after the defendant turned 18." (*People v. Edwards* (2019) 34 Cal.App.5th 183, 194 (*Edwards*).) The One Strike law is an alternative, harsher sentencing scheme that applies to specified felony sex offenses.

(*People v. Anderson* (2009) 47 Cal.4th 92, 102.) Xicotencatl, who was 19 years old at the time he committed forcible rape and sodomy against Vanessa, was sentenced to two One Strike LWOP sentences. (See § 667.61, subdivision (*l*).) He contends the exclusion of youthful sex offenders, such as himself, violates the Equal Protection Clause of the Fourteenth Amendment. We disagree.

After briefing in this case, an appellate court concluded that the "carve-out in section 3051, subdivision (h) [categorically excluding youthful One Strikers] violates principles of equal protection and is unconstitutional on its face." (*Edwards*, *supra*, 34 Cal.App.5th at p. 199.) In *Edwards*, the defendants were 19 years old when they raped and sodomized an adult victim and were sentenced to lengthy One Strike determinate terms. (*Id.* at p. 186.) They challenged on equal protection grounds their exclusion from the parole provisions of section 3051, and the court agreed. According to the *Edwards* court, "[b]ecause the Legislature made youthful-offender parole hearings available even for first degree murderers (except those who committed murder as an adult *and* received an LWOP sentence), there is no rational basis for excluding One Strike defendants from such hearings." (*Id*. at p. 197.) However, unlike the offenders in *Edwards*, Xicotencatl was sentenced to two LWOP terms. He is not situated differently from a youthful offender who commits first degree murder as an adult and received an LWOP sentence because such a youthful murderer, like Xicotencatl, would not receive a youthful-offender parole hearing under section 3051. Thus, Xicotencatl fails to show he was denied equal protection. (See *In re Eric J.* (1979) 25 Cal.3d 522, 530 ["The first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner."].)

III

DISPOSITION

The judgment is affirmed.

ARONSON, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

THOMPSON, J.